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No. 85-140

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,

Petitioner,

v.

MICHAEL HARDWICK, and
JOHN and MARY DOE,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF PETITIONER

STEVEN FREDERICK MCDOWELL
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

Counsel of Record for
Amicus Curiae

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INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League), a voluntary, non-profit association, national in membership, is organized, *inter alia*, to promote the public welfare and to preserve the integrity of the family, the rights of parents and children, and the validity of laws that serve those ends. With respect to the instant case, the League is directly concerned with the proper construction of the Constitution and alleged "fundamental" rights thereunder as they promote or undermine the integrity of family and social relations. The League is especially concerned with attempts to create by false theories of "autonomy" privacy, new and absolute constitutional immunities from state regula-

tion of sexual conduct that go beyond the traditional privacy of marriage, marital intimacy, procreation and childbearing. Accordingly, the League, with letter permission of the counsels of record for the parties involved, files this amicus brief.

SUMMARY OF ARGUMENT

As noted by the Court below: "This suit . . . presents an anticipatory challenge to the state [sodomy] statute," 760 F.2d at 1205, in the absence of allegation or record evidence of any pending or threatened prosecution against any of the complaining parties. For purposes of argument and analysis, it is important to note that this case does not rest upon a constitutional claim of "zonal" privacy which protects all individuals from unreasonable searches and seizure, but only presents a theory of constitutional "autonomy" privacy specifically with respect to homosexual conduct, which, in turn, rests upon a fundamental right claim that is totally unsupported by constitutional text or history, and is flatly contrary to centuries of Anglo-American tradition and laws.[1]

With respect, it is submitted that the Circuit Court below erred in holding: (a) that Hardwick had standing, in the circumstances, to bring this suit; and further (b) that he had a "fundamental" constitutional right to practice homosexual sodomy.

Hardwick should have been denied standing in this case on either or both traditional tests for standing, namely, that his alleged injury by the challenged statute was not sufficiently material or imminent to justify constitutional adjudication; and that prudential discretion against granting standing should have been exercised for lack of a sufficient record of enforcement experience or of state review of the challenged statute. The same reasons which led all judges below to deny standing to sue to John and Mary Doe, should have applied equally to deny standing to Hardwick.

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[1] The privacy claims of married couples as raised by plaintiffs, John and Mary Doe were not reached, since their case was dismissed for lack of standing. 760 F.2d at 1206-07. The issue of marital "autonomy" privacy is clearly distinct from homosexual relations and is not here relevant.

The caution which the Supreme Court itself has recently exercised in limiting review of homosexual rights claims, viz. of public school teachers and other public officials,[2] should have counseled the court below against venturing, on the flimsiest of records, an essentially advisory constitutional ruling with momentous potential to undermine state power to control or regulate homosexual conduct, and its promotion in situations far beyond the isolated incident that Hardwick has seized upon.

With respect to its finding of a constitutional right to practice consensual homosexual sodomy in private, the majority ruling erred in several respects. It failed to follow, and seriously misapplied, this Court's decision in *Doe v. Commonwealth's Attorney,* by a construction that is strained and contrary to the interpretation adopted by other circuits. Dissenting Circuit Judge Kravitch noted: "The United States Supreme Court, in *Doe v. Commonwealth's Attorney* . . . summarily affirmed the judgment of a three-judge district court upholding the constitutionality of a Virginia sodomy statute nearly identical to Georgia's." 760 F.2d at 1213 (citations omitted). In *Dronenburg v. Zech,* 743 F.2d 1388 (D.C. Cir. 1984), the Court flatly rejected the very argument adopted by the majority panel below: "[W]e doubt that a court of appeals ought to distinguish a Supreme Court precedent on the speculation that the Court might possibly have had something else in mind." *Id.* at 1392; *accord: Baker v. Wade,* 769 F.2d 289 (5th Cir. 1985).

Instead the majority panel below collected snippets of dicta from marital privacy and pregnancy regulation opinions to construct a privacy right which it admitted has not to date been recognized in constitutional law. *See* 760 F.2d at 1210. The majority below thus gave greater weight to dicta stitched from unrelated Supreme Court footnotes and opinions on mar-

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[2] *See, e.g., National Gay Task Force v. Board of Education,* 729 F.2d 1270 (10th Cir. 1984) *aff'd by equally divided court,* 105 S. Ct. 1858 (1985). *Rowland v. Mad River Local School District,* 730 F.2d 444 (6th Cir.), *cert. denied,* 105 S. Ct. 1373 (1985); *Gaylord v. Tacoma School District,* 88 Wash. 2d 286, *cert. denied,* 434 U.S. 879 (1977). *See also* W. Valente, *Education Law* §§ 13.11; 15.50 (1985).

riage and pregnancy,[3] than it gave to Supreme Court rulings in cases directly concerned with homosexual conduct. Its confusion of the nature of fundamental rights in marriage, pregnancy and family relations with sexual gratification by homosexual conduct has no support in constitutional authority or in the traditions that underlie fundamental rights theory.

The creation of a new constitutional right to practice homosexual sodomy has great potential to undermine the government protection of public interests controlling homosexuality in public, civil and military service, public health, public education, and the operational freedom of religious and quasi-public private associations. Nor is there any other overriding public policy consideration which militates in favor of extending constitutional protection to homosexual conduct and which would justify avoidance of this Court's controlling precedent of *Doe v. Commonwealth's Attorney*.

ARGUMENT

I.

HARDWICK DOES NOT HAVE STANDING TO PURSUE THIS MATTER.

The court of appeals correctly determined that a married couple, the Does, did not have standing to pursue this matter. 760 F.2d at 1206-07. The court of appeals should also have found that Hardwick lacked standing.

The Does were not threatened with criminal prosecution. Although Hardwick was initially prosecuted, his prosecution was not carried forward. 760 F.2d at 1204. There is nothing to support the conclusion that the state would carry through with a future prosecution of Hardwick or other homosexuals for violation of the sodomy law. The combination of Hardwick's unpursued prosecution, Hardwick's continued

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[3] *See* 760 F.2d at 1211-1213. The majority invocation of *Eisenstadt v. Baird* (760 F.2d at 1212) is unsound in two respects—*Eisenstadt* involved contraception rights, and "*Eisenstadt* . . . did not explicitly rely on . . . fundamental rights-strict scrutiny analysis." J. Nowak, R. Rotunda, J. Young, *Constitutional Law*, 739 (2d ed. 1983). *See also* G. Gunther, *Cases and Materials on Constitutional Law*, 514-15 (11th ed. 1985).

engagement in sodomy and Hardwick's general statements concerning Atlanta police enforcement practices are insufficient to constitute the real threat of prosecution necessary for an anticipatory challenge of the statute. *Compare Younger v. Harris*, 401 U.S. 37, 42 (1972) *with Steffel v. Thompson*, 452 U.S. 452, 459 (1974). In this case Hardwick's alleged threat of prosecution is nearly as "imaginary or speculative"[4] as the Does'.[5]

Even when a case or controversy exists the Court will exercise its prudence to deny standing to parties in situations in which anticipatory constitutional challenges may not be appropriate. *See Poe v. Ullman*, 367 U.S. 497, 509 (1961). This case is an excellent candidate for exercise of such prudence. As just demonstrated, the injury Hardwick alleges is extremely speculative. There is not a strong record of enforcement experience or state review of the statute. Further, this case could have an impact far beyond the facts of this matter.[6] The caution which this Court has recently exercised in choosing not to review certain general homosexual rights claims[7] and other homosexual rights claims involving public school

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[4] *Younger*, 401 U.S. at 42.

[5] As discussed below, amicus disagrees with the court of appeals' conclusion that *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D.Va. 1975) was based upon a lack of standing. However, if this were the case the court of appeals should also have been led to dismiss Hardwick's claim for lack of standing. *Cf.*, 760 F.2d at 1214 (Kravitch, J., concurring in part and dissenting in part). The court of appeals cannot have it both ways.

[6] *See infra*, p. 12.

[7] *See New York v. Uplinger*, 104 S. Ct. 2332 (1984); *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981).

teachers and public officials[8] should counsel against deciding, on the flimsiest of records, an important constitutional ruling with possibly devastating consequences.

II.

HOMOSEXUALS' ENGAGEMENT IN SODOMY IS NOT PART OF THE RIGHT TO PRIVACY PROTECTED BY THE UNITED STATES CONSTITUTION.

The decision below is contrary both to governing precedent of this Court, and to any reasoned, policy-based construction of this Court's precedents in other areas of privacy.

A. The Court of Appeals' Decision is Contrary to this Court's Decision in *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D.Va. 1975).

All of the court of appeals judges agreed that this Court's decision in *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976) *aff'g* 403 F. Supp. 1199 (E.D.Va. 1975) constitutes a binding precedent on the lower courts. *See* 760 F.2d at 1207-08, 1213-16. In *Doe*, this Court summarily affirmed a district court decision that homosexual sodomy was not protected as a constitutional privacy right. As above noted, the dissenter below, the district judge below, and two other courts of appeals, quite properly decided that *Doe* was a decision on the merits of the privacy claim.[9] However, the majority

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[8] *See, e.g., National Gay Task Force v. Board of Education*, 729 F.2d 1270 (10th Cir. 1984) *aff'd by equally divided court*, 105 S. Ct. 1858 (1985). *Rowland v. Mad River Local School District*, 730 F.2d 444 (6th Cir.), *cert. denied*, 105 S. Ct. 1373 (1985); *Gaylord v. Tacoma School District*, 88 Wash. 2d 286, *cert. denied*, 434 U.S. 879 (1977). *See also* W. Valente, *Education Law* §§ 13.11; 15.50 (1985).

[9] *See Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985); *Hardwick v. Bowers*, 760 F.2d 1202, 1213-1216, *reh'g denied*, 765 F.2d 1123 (11th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3292 (U.S. Nov. 4, 1985) (No. 85-140) (Kravitch, J., dissenting); *Dronenburg v. Zech*, 741 F.2d 1388, 1391-1392, *reh'g denied*, 746 F.2d 1879 (D.C. Cir. 1984); *Hardwick v. Bowers*, Civil Action No. C83-273A (N.D.Ga. April 15, 1983).

below sought to distinguish away *Doe* by reading it as confined to the issue of standing-to-sue. *See* 760 F.2d at 1207-08. That reading is not only contrary to the record and other authorities, but is manifestly gratuitous. There is nothing whatsoever in the opinion of the majority panel below which supports its reconstruction of the *Doe* decision from a clear decision that denied a homosexual conduct right of privacy (as here claimed) into a decision exclusively based on standing to sue.

The attempt by the majority below to support its narrowed reading of *Doe,* by reference to footnote exchanges in *Carey v. Population Services,* 431 U.S. 678, 688 n.5 (1977) (majority opinion), 694 n.17 (plurality opinion) and 718 n.2 (dissenting opinion) fails in that the majority and plurality opinions in *Carey* were not concerned with undecided constitutional issues. Rather, the *Carey* majority recognized *Doe* as binding precedent on consensual homosexual activity. *See* 760 F.2d at 1214-1215 (Kravitch, J., concurring in part, dissenting in part).

The further attempt by the majority below to avoid *Doe v. Commonwealth's Attorney,* by citation to post-*Doe* doctrinal developments,[10] must also fail. The Supreme Court dicta invoked by the court below, as shown in the next section of this brief, was drawn from judicial comment totally unrelated to homosexual conduct, i.e., from statements regarding heterosexual relations in the context of pregnancy or marriage. Apparently the court below equated homosexual rights with the rights of married couples or of pregnant females.[11] As will be seen, such an extension is totally unsupported by the policy foundations that underlie the latter cases and has been flatly rejected in other recent court of appeals decisions.

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[10] "Even if *Doe* had been resolved on the constitutional grounds now asserted . . . the Supreme Court has indicated since that time that the constitutionality of statutes such as the one in question . . . is not governed by *Doe,* but rather, remains an open question."760 F.2d at 1208 (citation omitted).

[11] *See* 760 F.2d at 1211-13.

B. The Court of Appeals' Decision is Contrary to a Reasoned, Policy-based Construction of this Court's Privacy Precedents.

Even if *Doe* were not controlling precedent, a reasoned, policy-based construction of this court's privacy decisions would require rejection of the claim that homosexuals' engagement in sodomy is part of the Constitution's privacy right.

The constitutional right to privacy evolved from beginnings quite far removed from the circumstances involved in this case. Indeed, the inaugural personal rights privacy cases, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923), involved the protection of parents' rights in childrearing and education under the "liberty" component of the Due Process Clause. It would be most difficult to discern a connection between these traditionally cherished parental interests in rearing families and the privacy right to homosexual sodomy fashioned by the court of appeals.[12] Predictably, the court of appeals attempted to utilize *Griswold v. Connecticut*, 381 U.S. 479 (1965) to justify its finding of a privacy right for homosexual sodomy. *See* 760 F.2d at 1211-1212. This action reflects the fact that *Griswold* is the foundation upon which all modern privacy adjudication is built. In *Griswold* this Court used several different analyses to find that married people had a constitutional privacy right to use artificial contraceptives. At the center of the Court's reasoning was the interference the involved statute caused to the normal incidence of the marital relationship. Emphasizing the central role of the marital relationship in its decision the *Griswold* Court noted:

> We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being secret.

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[12] This Court does not have before it the question of prohibitions on sodomy in marriage and should not resolve this unnecessary issue.

381 U.S. at 486. As so construed one could arguably see how an interference with decisions about childbearing in marriage might implicate the family-oriented rights protected in *Pierce* and *Meyer*.

Griswold gave rise to a number of different lines of cases construing this privacy right. Several of these lines may be said to fairly clearly fit within the family-based rationale of *Pierce, Meyer,* and *Griswold.* For example, this Court has found that a right to marry inheres in the privacy right.[13] A family basis is also clear in the Court's cases finding rights of related individuals to live together which do not extend to unrelated individuals.[14] This same fidelity to family interests as the foundation of privacy rights can also be found in a case involving the interests of natural married parents in preservation of custody of their children[15] and in the Court's refusal to find that foster parents, lacking any natural or adoptive familial relationship, have any privacy rights in continued custody of their children.[16] None of these cases, grounded as they are in the traditional family framework, provide any support for a privacy right for totally unrelated people to engage in homosexual sodomy. Indeed, the rejection of privacy interests for "unrelated" individuals requires the conclusion that the cases would support no privacy interest in this context.[17]

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[13] *See Zablocki v. Redhail,* 434 U.S. 374, 383-85, 386 (1978); *Loving v. Virginia,* 388 U.S. 1, 12 (1967).

[14] *Compare Moore v. City of East Cleveland,* 431 U.S. 494 (1977) *with Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974).

[15] *See Santosky v. Kramer,* 455 U.S. 745, 753-54 (1982).

[16] *See Smith v. Organization of Foster Families,* 431 U.S. 816 (1977).

[17] Cases in which this Court has found a privacy interest of an unmarried natural parent in custody of his or her children also do not provide any support for the notion that the privacy rights of family life automatically attach to all sexual activity and its consequences. In this Court's most recent decision on this issue the Court noted that: *"Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."Lehr v. Robertson,* 463 U.S. 248, 260 (1983) (emphasis in original) (quoting from *Caban v. Mohammed,* 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)).

While each of the cases discussed to this point may be readily distinguished from the instant case based upon their relationship with matters of family life, this relationship to family matters is less clear in other cases. It might be argued, for example, that the right to procreate is a right totally independent of family life. However, the cases upon which the right to procreate is based appear to look toward the family-oriented value of procreation during marriage and do not seem to establish a right to procreate outside of marriage. *See Skinner v. Oklahoma,* 316 U.S. 535, 541-42 (1942) (stating that *marriage and procreation* were fundamental). Indeed, one of the justifications cited for recognizing a fundamental right to marriage in *Zablocki v. Redhail,* 434 U.S. 374, 384 (1978) was the fact that the right to procreate must imply the right to enter the only relationship in which the involved state had legalized procreation.[18] Thus, the right to procreate, in itself, has never been fully divorced from the family setting.

The set of personal privacy cases which bear the least relationship to traditional family concerns are *Eisenstadt v. Baird,* 405 U.S. 438 (1972), *Roe v. Wade,* 410 U.S. 113 (1973)[19] and *Carey v. Population Services International,* 431 U.S. 678 (1977). For this reason these cases obviously have the least validity as part of the Constitution's privacy rights. Yet, upon a thorough, policy-based examination, even these cases do not provide any real support for a privacy right to engage in homosexual sodomy.

Eisenstadt v. Baird, 405 U.S. 438 (1972), represented the first attempt to extend privacy rights beyond the traditional family context. *Eisenstadt* does not, however, establish an individual autonomy privacy right to engage in sexual activity of any type. Initially, it is important to remember that

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[18] The *Zablocki* Court made no suggestion that a restriction of sex outside marriage was unconstitutional. Instead, it relied upon this restriction as a basis for holding that there was a fundamental right to marriage.

[19] In citing *Roe* in this context amicus also includes the later abortion rights cases which are grounded upon *Roe.*

the lead opinion in *Eisenstadt* was merely a plurality opinion which did not receive the support of a five-member majority of the Court. Thus, language contained in *Eisenstadt* is of limited precedential value. Further, Justice White, together with Justice Blackmun, cogently criticized the lead opinion on the basis that it did not need to reach the question of the constitutionality of prohibition of distribution of contraceptives to the unmarried. *See* 405 U.S. at 465 (White, J., concurring in the result). Accordingly, the lead opinion in *Eisenstadt* is of questionable value.

However, even the *Eisenstadt* lead opinion does not support an individual autonomy privacy right to engage in sexual activity. The lead opinion stated only that, under the facts of that case, the state could not justify a marital status-based limitation on a matter "so fundamentally affecting a person as the decision whether to bear or beget a child."405 U.S. at 453. Thus, the lead opinion was based upon an equal protection-rational basis analysis rather than a fundamental right-strict scrutiny analysis. *See* 405 U.S. at 446-455. *See also* G. Gunther, *Cases and Materials on Constitutional Law*, 514-515 (11th ed. 1985); J. Nowak, R. Rotunda, J. Young, *Constitutional Law*, 739 (2d ed. 1983). *Eisenstadt* does not support a fundamental right to engage in any sort of activity. Even more importantly, however, the *Eisenstadt* lead opinion is not based upon a right to engage in sexual activity outside of marriage, but only upon interference with certain childbearing decisions. Indeed, the lead opinion itself recognized the legitimacy of state treatment of marital sexual activity in a manner different from its treatment of premarital and extra-marital sexual activity. *See* 405 U.S. at 448. This conclusion is merely an affirmation of positions taken in *Griswold* by concurring Justices Goldberg, 381 U.S. at 498-99, and White, 381 U.S. at 505, who had noted that a privacy-based right of contraception would have no effect on state prohibitions of fornication, adultery or homosexuality. *Eisenstadt*, even if inappropriately accorded strong precedential value, does not support an individual autonomy privacy right to engage in any form of sexual activity. Even more clearly, its foundation upon the traditionally

family-oriented decision of whether to bear or beget a child, provides absolutely no support for an autonomy privacy right to homosexual sodomy, a case in which the childbearing decision is not even remotely involved.

Eisenstadt's "decision to bear or beget a child" analysis carried over to this Court's opinion in *Roe v. Wade*, 410 U.S. 113 (1973). *Roe* is important in this case because of the limits it places on the privacy right. The *Roe* court found that the privacy-based "decision to bear or beget a child" included a qualified right to decide to have an abortion. 410 U.S. at 153-154. Interestingly, the Court noted that it had not previously recognized "an unlimited right to do with one's body as one pleases"[20] and that it failed to discern a close relationship between this idea and the right of privacy. *See* 410 U.S. at 154. *Roe*, again, is nothing more than a decision recognizing rights this Court felt were associated with the "decision whether to bear or beget a child." Its language provides no sanction for a privacy right outside the contexts of the family relationship or the decision whether to bear or beget a child. Indeed, its refusal to find a constitutional right to bodily autonomy indicates an unwillingness to extend privacy rights to include any activity which could be characterized as "sexual."

In spite of the significance the court of appeals attached to this Court's decision in *Carey v. Population Services International*, 431 U.S. 678 (1977), even that case was carefully limited to rights associated with the decision whether to bear or beget a child. The Court's analysis described *Griswold*, *Eisenstadt* and *Roe* as holding that the "decision whether to bear or beget a child" was constitutionally protected. *See* 431 U.S. at 685-686, 687-689. The *Carey* Court refused to modify *Roe*'s refusal to find a right of bodily autonomy included within the privacy right. In fact, the Court explicitly held that its decision found no right to be free from limits on sexual freedom or burdens on consensual sexual relations. 431 U.S. at 688 n.5. Instead, it noted its decision involved only burdens on rights previously found to constitute protected childbearing decisions. *Id.* This fact was clearly

[20] 410 U.S. at 154.

emphasized in separate opinions of particular Justices. For example, both Justices White and Stevens rejected the existence of a constitutional right for minors to engage in premarital sexual activity. *See* 431 U.S. at 702-703 (White, J., concurring in part and concurring in the result); 431 U.S. at 713 (Stevens, J., concurring in part and concurring in the judgment). Similarly, Justice Rehnquist observed that, at a minimum, the homosexual sodomy involved in this case was outside the relevant scope of protection. 431 U.S. at 718 n.2 (Rehnquist, J., dissenting). Quite clearly, *Carey* provides no support for the extension of privacy rights to homosexual activity.[21]

Even though previous decisions of this Court provide no sanction for a right to engage in homosexual sodomy, there remains the question of whether this activity should now be

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[21] The remaining personal privacy decision which might be applicable is *Stanley v. Georgia*, 394 U.S. 557 (1969). The court of appeals utilized this decision as one of the bases upon which it found a privacy right to homosexual sodomy. *See* 760 F.2d at 1212. However, *Stanley* is of little relevance in this matter. First, *Stanley* is inapplicable unless a court finds an underlying constitutionally protected interest. Without such an interest *Stanley*'s right to be free from interference in the home is irrelevant. In *Stanley* there existed an underlying First Amendment right to possess literature in the home which was then buttressed by a privacy right. The necessity of an underlying constitutional right explains why the *Stanley* Court could confidently claim its decision would not constitutionally protect private possession of items, such as drugs, when the possession does not independently enjoy First Amendment or other constitutional protection. 394 U.S. at 568 n.11. As was just discussed, and will be further discussed, homosexual sodomy does not enjoy the same type of underlying constitutional protection as does the right to privately read certain materials. It is not one of the family-oriented activities or decisions relating to bearing or begetting of a child which raid constitutional privacy interests. Thus, there does not exist the underlying constitutional interest necessary to allow constitutional protection under the *Stanley* analysis. *Stanley* is also of little relevance because it involves regulation of possession of reading material designed only for the mind and does not involve actual physical conduct. *See Stanley*, 394 U.S. at 565-566. The *Stanley* Court was careful to note that mere possession of reading material raised entirely different questions from the regulation of conduct. *See id.* at 565-567. While one may privately read about actions ranging from murder to bestiality, one does not have the same right to engage in all of these activities in the privacy of one's home.

determined for the first time to be part of the constitutional privacy right. Such a question must be answered negatively. The right to engage in homosexual sodomy simply is not a right which can be considered "implicit in the concept of ordered liberty." *See Roe,* 410 U.S. at 152. This activity is not even remotely part of traditional family concerns or child begetting and bearing functions. It is an activity which has been traditionally condemned rather than considered a foundation of our society. *See Baker v. Wade,* 769 F.2d 289, 292 (5th Cir. 1985); *Dronenburg v. Zech,* 741 F.2d 1388, 1396, *reh'g denied,* 746 F.2d 1579 (D.C. Cir. 1984). This factor mitigates against the recognition of homosexual sodomy as a protected right. *See Moore v. City of East Cleveland,* 431 U.S. 494, 501-504 (1977) (plurality opinion); *Griswold v. Connecticut,* 381 U.S. 479, 501 (1965) (Harlan, J., concurring in the judgment); *Poe v. Ullman,* 367 U.S. 497, 553 (1961) (Harlan, J., dissenting) (recognizing that adultery and homosexuality were outside the scope of traditionally and constitutionally protected marital activity); *Dronenburg v. Zech,* 741 F.2d at 1396 (noting traditional condemnation of homosexual activity in finding this activity not to be included in right of privacy). *Cf. Baker v. Wade,* 769 F.2d at 292 (noting traditional condemnation of homosexuality as a justification of sodomy statute against equal protection attack). In light of the fact that this decision involves the creation of a privacy right in a situation in which not even a remotely related privacy right has previously been found, this case is a most appropriate one for exercise of separation of powers based self-restraint from the temptation to create a new privacy right. *See Dronenburg,* 741 F.2d at 1396-1397 (quoting *Moore v. City of East Cleveland,* 431 U.S. 494, 544 (1977) (White, J., dissenting)). A decision recognizing a constitutional right to engage in homosexual sodomy could have enormous effects upon legislative and executive decisions involving public, civil and military service, public health, public education and the operational freedom of religious and quasi-public private associations. Given these tremendous implications there are few better cases for leaving regulation of an activity to the legislative branch than this one. Accordingly, this Court

should not take this opportunity to create a new constitutional right of homosexual sodomy.

The Court's refusal to create a constitutional right to homosexual sodomy would accord with the weight of court of appeals precedent. *Compare Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985), *Dronenburg v. Zech*, 741 F.2d 1388, 1391-1398, *reh'g denied*, 746 F.2d 1579 (D.C. Cir 1984) *with Hardwick v. Bowers*, 760 F.2d 1202, 1207-1213, *reh'g denied*, 765 F.2d 1123 (11th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3292 (U.S. Nov. 4, 1985) (No. 85-140). Of these cases the most significant is *Dronenburg v. Zech*, in which the District of Columbia Circuit independently analyzed the privacy right and concluded that homosexual sodomy was not part of this right. The court's analysis is instructive because it carefully considered this Court's privacy precedents and correctly found no support for the creation of a right to homosexual activity. *See* 741 F.2d at 1391-1397. The *Dronenburg* court concluded its survey by noting:

> In this group of cases . . . we do not find any principle articulated even approaching in breadth that which appellant seeks to have us adopt. The Court has listed as illustrative of the right of privacy such matters as activities related to marriage, procreation, contraception, family relationships, and childrearing and education. It need hardly be said that none of these covers a right to homosexual conduct.

741 F.2d at 1395-96. The *Dronenburg* court's careful approach contrasts markedly with the selective and expansive use of Supreme Court precedent by the court of appeals in the instant case. *See* 760 F.2d at 1211-1213. Similarly, the *Dronenburg* court paid great attention to doctrines of judicial self-restraint and separation of powers in refusing to expand the scope of the privacy right beyond the confines this Court has traditionally given it. *See* 741 F.2d at 1396-1397. The *Dronenburg* court made the following observation in this regard:

In dealing with a topic like this, in which we are asked to protect from regulation a form of behavior never before protected, and indeed traditionally condemned, we do well to bear in mind the concerns expressed by Justice White, dissenting in *Moore v. City of East Cleveland*, 431 U.S. 494, 544, 97 S. Ct. 1932, 1958-59, 52 L.Ed.2d 531 (1977):

> That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the current construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, and that much of the underpinning for the broad, substantive application of the Clause disappeared in the conflict between the Executive and the Judiciary in the 1930's and 1940's, the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably preempts for itself another part of the governance of the country without express constitutional authority.

741 F.2d at 1396. The concerns isolated by the *Dronenburg* court and Justice White are of particular importance here. This Court should also refuse to create a new and unprecedented constitutional right to engage in homosexual sodomy.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

STEVEN FREDERICK MCDOWELL
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

Counsel of Record for
Amicus Curiae

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